RECORD AND BRIEFS

FILED
AUG 29 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-476

IN THE
Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U.S. 144 (1992)?

PARTIES TO THE PROCEEDING

Petitioners Christopher J. Christie, as Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; Stephen M. Sweeney, President of the New Jersey Senate; Vincent Prieto, Speaker of the New Jersey General Assembly; and the New Jersey Thoroughbred Horsemen's Association, Inc. were appellants in the court of appeals. The New Jersey Sports and Exposition Authority was a defendant in the district court.

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball were appellees in the court of appeals.

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The opinion of the *en banc* court of appeals is reported at 832 F.3d 389 (3d Cir. 2016). *See* Pet. App. A. The opinion of the three-judge panel of the court of appeals is reported at 799 F.3d 259 (3d Cir. 2015). *See* Pet. App. C.

The opinion of the district court granting summary judgment to respondents and the order enjoining State officials from giving effect to New Jersey's 2014 repeal of state-law prohibitions on sports wagering is reported at 61 F. Supp. 3d 488 (D.N.J. 2014). *See* Pet. App. D; JA382.

JURISDICTION

The court of appeals had jurisdiction to review the district court's final judgment and permanent injunction pursuant to 28 U.S.C. §§ 1291 & 1292(a). The court of appeals granted *en banc* rehearing on October 14, 2015, and entered its judgment on August 9, 2016. *See* Pet. App. G. Petitioners timely filed a petition for a writ of certiorari on October 7, 2016, which this Court granted on June 27, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 3702(1) of the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 *et seq.* (PASPA) provides:

It shall be unlawful for--

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, * * *

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702(1).

Other pertinent constitutional provisions and statutes are reprinted in the Appendix, *infra*, 1a.

STATEMENT

One of the "essential postulates" derived from the "structure of the Constitution," is that "state legislatures are *not* subject to federal direction." *Printz* v. *United States*, 521 U.S. 898, 912, 918 (1997) (citations omitted). Indeed, this anti-commandeering principle is so vital to the functioning of our federalist system of government that this Court has held that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York* v. *United States*, 505 U.S. 144, 178 (1992). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166.

PASPA compels States to regulate—indeed, prohibit—sports wagering and therefore exceeds Congress's authority.

In 2012, New Jersey attempted to adopt a carefully crafted regulatory regime to control sports wagering that was already taking place within its borders, and asserted that PASPA would violate the Tenth Amendment if it prohibited New Jersey from doing so. Respondents and the United States claimed that New Jersey's regulations violated PASPA and argued that PASPA was constitutional because it did not require States to maintain prohibitions against sports wagering. Rather, it prohibited only "licensing" and other affirmative "authorizations by law"—and thus did not impermissibly direct States in the exercise of their police powers. The Third Circuit adopted this reasoning—it held that to construe PASPA to require New Jersey to "keep a ban on sports gambling in their books" would "rest[] on a false equivalence between repeal and authorization," Pet. App. 160a—and upheld PASPA as so construed. This Court denied New Jersey's petition for certiorari.

New Jersey accepted the Third Circuit's ruling that New Jersey could repeal key provisions of its prohibitions on sports wagering and enacted the repeal at issue here. That repeal immediately was challenged by respondents (supported again by the United States) as a disguised authorization-by-law of sports wagering in violation of PASPA. The Third Circuit then reversed itself, held that New Jersey's repeal violated PASPA, and affirmed an injunction prohibiting the State's Executive from "giving effect" to the repeal. Pet. App. 8a.

This federal-court order now perversely compels New Jersey officials to maintain in force, as state law, prohibitions against sports wagering that, as far as the New Jersey Revised Statutes are concerned, no

longer exist. A federal court, purporting to enforce *federal law*, now is dictating the contents of New Jersey's *state law* concerning sports wagering. And New Jersey officials are drafted into service as "puppets of a ventriloquist Congress," expressing the federal commands as the laws of the State against the clear wishes of its citizens. *Printz*, 521 U.S. at 928 (quotations omitted).

Neither the district court nor the court of appeals articulated any precedent for this federal command to state officials to "give effect" to a state law the State has repealed. This is not surprising because it is difficult to imagine a more patent violation of the anti-commandeering principle—or a more destructive incursion into the reserved sovereignty of a State—than this type of federal usurpation of the lawmaking function of the State's Legislature. But that, unmistakably, is what the lower courts' injunction does.

The Third Circuit perceived no violation of the anti-commandeering principle, reasoning that PASPA "[d]oes not command states to take affirmative actions," and leaves them "sufficient room . . . to craft their own policies" concerning sports wagering. Pet. App. 23a. But whatever "room" PASPA affords to States does not include any realistic means to repeal state-law prohibitions on sports wagering applicable at casinos and racetracks. And if PASPA forbids States from repealing those particular prohibitions, then it is requiring that they be maintained, which is very much an affirmative act on the part of the State.

PASPA's conscription of New Jersey's legislative and executive branches with respect to sports wager-

ing is manifestly unconstitutional. The remaining issue is the scope of the remedy. That remedy must include excision of the statute's prohibitions on state "licens[ing]" and "authoriz[ation] by law." The United States and the Third Circuit previously stretched to avoid this conclusion by construing PASPA to permit States to repeal their prohibitions on sports wagering, while forbidding them from licensing or otherwise "authoriz[ing] by law" the activity. That approach defies the language and clear purpose of the statute, which plainly sought to force States to maintain their existing prohibitions. Had Congress understood that PASPA could not constitutionally prevent States from repealing their prohibitions on sports wagering, it certainly would not have prohibited States from responsibly regulating it through a system of licensing. Since PASPA cannot constitutionally prohibit legalization under state law, PASPA's prohibitions on state licensing and authorization by law—at least—must be stricken. And because PASPA cannot function as Congress intended without those core prohibitions, the rest of the statute must fall with them.

A. The Professional And Amateur Sports Protection Act

Until recently, nearly all States prohibited wagering on sports. Nevada legalized sports wagering in 1949, but as of 1992, no other State had broadly permitted such wagering. In that year, in response to a purported concern about "the potential effect of legalized sports gambling on America's youth," S. Rep. 102-248, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, and in an effort to "stop the spread of legalized gambling on sports events," 138 Cong. Rec. H11757

(daily ed. Oct. 5, 1992) (statement of Rep. Brooks), Congress enacted PASPA.

The U.S. Department of Justice "oppose[d] enactment" of the legislation. Pet. App. 225a. The Department observed that, under federal law, "it [wa]s left to the states to decide whether to permit gambling activities based upon sporting events." *Id.* at 224a. While "[f]ederal law generally prohibits any use of an interstate facility in connection with such sports-gambling activities," *ibid.*, sports wagering does not violate federal law if it is legal in the State in which it takes place, *see* 18 U.S.C. § 1084(b) (exempting "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal").

PASPA did not alter this background federal rule. Instead, PASPA sought to "stop the spread" of sports wagering by making it "unlawful" for a State "to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering, 28 U.S.C. § 3702(1) (emphasis added), or for an individual to "sponsor, operate, advertise, or promote" sports wagering "pursuant to the law of a governmental entity," *id.* § 3702(2).

Nevada was exempted from PASPA and remained free to license and regulate sports wagering in any manner it deemed appropriate. *See* 28 U.S.C. § 3704(a)(1); Pet. App. 124a. PASPA also permitted the three other States that already had enacted sports lotteries—Montana, Delaware, and Oregon—to continue to sponsor and operate those very limited

schemes. *See* 28 U.S.C. § 3704(a)(2). Finally, PASPA included a provision under which New Jersey could have authorized and licensed sports wagering in Atlantic City, but only "pursuant to a comprehensive system of State regulation," and only if such sports wagering "was authorized" within one year of PASPA's effective date. *Id.* § 3704(a)(3). But New Jersey did not do so within the one year Congress allowed.

Because PASPA does not require the federal government to do anything in furtherance of its aim of halting the spread of sports wagering, the Congressional Budget Office reported that PASPA would have "no cost to the federal government." S. Rep. 102-248, at 10. The Department of Justice, meanwhile, expressed "concern[]" that, "to the extent [PASPA] can be read as anything more than a clarification of current law, it raises federalism issues." Pet. App. 225a.

B. The 2012 Sports Wagering Law

If PASPA was intended to halt the growth of sports wagering, it failed in that objective. While under PASPA, state-licensed and comprehensively regulated sports wagering on single games has been confined to Nevada, *unlawful* sports wagering activity has exploded. The American Gaming Association (AGA) estimates that Americans illegally gamble around $149 billion on sports events each year. *See* Br. of AGA as *Amicus Curiae* Supporting Petitioners at 11, *Christie* v. *Nat'l Collegiate Athletic Ass'n*, No. 16-476 (U.S. Nov. 14, 2016). $4.2 billion was wagered on the 2016 Super Bowl, and another $9.2 billion was wagered on the 2016 NCAA men's basketball tournament—97 percent of it illegally. *See id.* at 12.

A substantial portion of illegal sports wagering activity is conducted by organized crime syndicates that are engaged in money laundering, racketeering, human and drug trafficking, and extortion. *See id.* at 13.

Faced with this massive, underground, and largely criminal sports wagering industry, New Jersey voters in 2011 overwhelmingly approved an amendment to the State's constitution that permitted the Legislature to enact measures legalizing, regulating, and controlling sports wagering. *See* N.J. Const., art. IV, § VII, ¶ 2(D), (F). The Legislature soon did so, passing the Sports Wagering Law, P.L. 2011, c. 231 (2012) (2012 Law). The 2012 Law modified the State's longstanding ban on sports wagering to provide for the licensing of sports-wagering pools at casinos and racetracks in the State. Regulations establishing a comprehensive regime for the licensing and close supervision of sports-wagering pools—including licensing fees, internal control approvals, reserve requirements, and detailed financial documentation—soon followed. *See* N.J. Admin. Code § 13:69N-1.1 *et seq.*

C. The *Christie I* Litigation

Several professional sports leagues and the National Collegiate Athletic Association (the "Leagues"), who are the respondents here, sued to enjoin the 2012 Law and its accompanying regulations, arguing they violated PASPA's "broad ban on sports betting." Complaint ¶ 4, *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), No. 12-4947 (D.N.J. Aug. 7, 2012) (ECF No. 1).

The State responded that PASPA is unconstitutional because it mandates that States "regulat[e] pursuant to Congress' direction," in violation of the

anti-commandeering principle as set forth in *New York* v. *United States*. The State argued that PASPA's mandate "that States maintain a ban on sports betting is indistinguishable from a federal law requiring States to enact laws prohibiting sports betting." State's Cross-Motion for Summary Judgment at 24, *Christie I* (D.N.J. Nov. 21, 2012) (ECF No. 76).[1]

Faced with the State's anti-commandeering argument, the Leagues abandoned their complaint's claim that PASPA imposes a "broad ban on sports betting" and argued instead that "[n]othing in PASPA necessarily compels states, either implicitly or explicitly, to maintain prohibitions on gambling." Leagues' Reply in Support of Motion for Summary Judgment at 12, *Christie I* (D.N.J. Dec. 7, 2012) (ECF No. 95). The United States, which had intervened to defend PASPA's constitutionality, similarly argued that PASPA did not "require New Jersey affirmatively to enforce its prohibitions on sports gambling." U.S. Br. in Support of Constitutionality of PASPA at 10, *Christie I* (D.N.J. Feb. 8, 2013) (ECF No. 136).

The district court granted summary judgment to the Leagues and a divided court of appeals affirmed. The panel majority acknowledged that a federal statute requiring States to maintain prohibitions on

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[1] New Jersey also argued that the Leagues would suffer no injury in fact from New Jersey's legalization, licensing, and regulation of sports wagering and thus could not establish Article III standing. New Jersey further contended that PASPA violated the equal sovereignty principle embodied in *Northwest Austin Municipal Utility District No. 1* v. *Holder*, 557 U.S. 193, 203 (2009), by allowing Nevada, for example, far greater authority in crafting its own legislation than it allows States such as New Jersey.

private conduct would raise "a series of constitutional problems." Pet. App. 160a. To avoid those constitutional problems, the court adopted the Leagues' construction of PASPA as not "requir[ing] states to keep prohibitions against sports gambling on their books." Leagues' Response Brief at 16, *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), No. 13-1715 (3d. Cir. June 7, 2013); *see also* Pet. App. 158a ("we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering"); *id.* at 165a ("we have held that [PASPA] does not require states to maintain existing laws"). The court rejected the State's arguments that the Leagues had proffered a "nonsensical interpretation of a law intended to *limit* sports wagering." State Opening Brief at 19, *Christie I* (3d Cir. Apr. 29, 2013). "*All that is prohibited,*" the majority declared, "is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." Pet. App. 158a (first emphasis added).

The State sought certiorari. After the United States assured this Court that PASPA permitted States to repeal their sports wagering bans "*in whole or in part*," JA197, this Court denied review.

D. New Jersey Repeals Its Prohibitions On Sports Wagering At Certain Venues.

New Jersey's elected officials debated how best to give effect to the wishes of New Jersey's citizens under the Third Circuit's ruling and ultimately enacted the 2014 Repeal. *See* P.L. 2014, c. 62 (2014). Unlike the 2012 Law, the 2014 Repeal does not license or regulate sports wagering. Instead, it repeals the 2012 Law

in its entirety and further "partially repeal[s] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sports contests or athletic events." *Ibid.*

Specifically, the 2014 Repeal repeals provisions in the criminal code, *see* N.J. Stat. Ann. § 2C:37-1 *et seq.*; the civil code, *see* N.J. Stat. Ann. § 2A:40 *et seq.*, including the Casino Control Act, N.J. Stat. Ann. § 5:12-1 *et seq.*, and other provisions in chapter 5 of Title 5 of the Revised Statutes (governing racetracks); and "any rules and regulations" that "prohibit participation in or operation of" a sports-wagering pool to the extent those laws apply at casinos, racetracks, and former racetracks, P.L. 2014, c. 62, § 1. It also repeals "any rules and regulations that may require or authorize any State agency to license, authorize, permit, or otherwise take action to allow any person" to engage in sports wagering. *Ibid.*[2]

As the undisputed record before the district court makes clear, the State's primary gaming and horse racing regulatory agencies—the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission—have no authority under the 2014 Repeal to engage in any regulation of sports wagering. These agencies are barred from

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[2] In accordance with the amendment to the State's Constitution enacted by the voters, the 2014 Repeal also limits the repeal to "the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events by persons 21 years of age or older" and excludes "a collegiate sport contest or . . . athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place." P.L. 2014, c. 62, § 1; *compare* N.J. Const., art. IV, § VII, ¶ 2(D), (F).

performing typical regulatory functions under the 2014 Repeal such as investigating the background or financial health of sports-wagering vendors, JA327; screening employees or evaluating their credentials, JA328; and requiring sports-pool lounges to use specific surveillance and security measures, *ibid.*

In short, under the 2014 Repeal, the State would have *no role* in licensing or regulating sports wagering that takes place at those locations where New Jersey's prohibitions had been repealed. Sports wagering by adults at those locations would be as legal as buying a cup of coffee at Starbucks; New Jersey would regard it as a private transaction subject only to generally applicable state and federal laws.

E. The *Christie II* Litigation

The Leagues immediately sued to enjoin the 2014 Repeal. Despite the United States' assurances in its brief opposing certiorari filed in this Court that New Jersey could repeal its prohibitions "in whole or in part," JA197, the Leagues argued instead that in fact New Jersey could only "alter or repeal aspects of its scheme for *enforcing* its prohibition." JA297. The only type of repeal of prohibitions PASPA permitted, the Leagues maintained, was one resulting in "complete deregulation." JA100. Tracking that argument, the district court held that PASPA "allow[ed] [S]tates only . . . two options": "either maintain [their] prohibition[s] on sports betting or . . . completely repeal" them. Pet. App. 99a. Since the 2014 Repeal did neither, the court held it violated PASPA and permanently enjoined the State "from violating PASPA through giving operation or effect to the 2014 Law in its entirety." *Id.* at 113a.

On appeal, the United States squarely rejected the district court's reasoning, stating that it did not "understand PASPA to draw a categorical distinction between complete and partial repeals." JA398. And the Leagues likewise sidled away from the ruling they had procured, suggesting that States might have options to legalize sports wagering short of complete deregulation, but maintaining that the 2014 Repeal nevertheless was a prohibited "authorization by law." JA415.

As in *Christie I*, a divided panel of the Third Circuit affirmed. Without acknowledging that *Christie I* had explicitly narrowed PASPA to permit repeals of state-law prohibitions to avoid "a series of constitutional problems," Pet. App. 160a, and that *Christie I* had rejected the equation of repeal with authorization as a "false equivalence," *ibid.*, the panel majority concluded that the 2014 Repeal "authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling." *Id.* at 60a–61a. According to the majority, "[t]hat selectiveness constitutes specific permission and empowerment" that constitutes an "authoriz[ation]" that violates PASPA. *Id.* at 61a. Judge Fuentes—the author of *Christie I*—dissented, stating that the majority's reasoning that a "partial repeal amounts to authorization" was "precisely the opposite of what we held in *Christie I*." *Id.* at 67a, 72a. *Christie I* had held that PASPA did not "*require*[] that the [S]tates keep any law in place" precisely because a repeal does not constitute an authorization by law, and it was on that

basis that the majority had "found PASPA did not violate the anti-commandeering principle." *Id.* at 72a.

The Third Circuit granted rehearing *en banc* and affirmed the district court by a vote of 9-to-3. The *en banc* majority adopted the panel majority's analysis as to whether the 2014 Repeal was an "authoriz[ation] by law" in violation of PASPA. Pet. App. 10a. It then "excise[d]" "as unnecessary dicta" *Christie I*'s holding—vital to its conclusion that PASPA did not impermissibly commandeer the States—that PASPA permits States to repeal prohibitions on sports wagering. *Id.* at 23a. The majority held that "a [S]tate's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Ibid.*

Turning to the question whether PASPA, as so construed, impermissibly commandeered the States, the majority began by acknowledging that "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." Pet. App. 18a (quoting *New York*, 505 U.S. at 166). But the majority nonetheless found that PASPA was "distinguishable from [the laws] struck down . . . in *New York* and *Printz*" because it did "not impose a coercive either-or requirement or affirmative command." *Id.* at 22a, 25a.

The court of appeals rejected as "erroneous" the district court's conclusion "that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on the books." Pet. App. 24a. The court suggested that "other options,"

such as a "repeal . . . to allow *de minimis* wagers between friends and family," "may pass muster" under PASPA if they had limited "authorizing effect." *Ibid.* But the court declined to "articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn." *Ibid.* Nor did the court attempt to find a basis for such distinctions in PASPA's text. This nevertheless was sufficient for the court to conclude that States are "afforded sufficient room under PASPA to craft their own policies," and thus that PASPA "does not present a coercive binary choice." *Id.* at 23a.

The court of appeals also "rejected" New Jersey's argument that PASPA commands "affirmative action" because it demands that the State "affirmatively keep [its] prohibition on the books." Pet. App. 23a. To support this conclusion, the court block-quoted *Christie I*'s conclusion that "PASPA does not *require* or coerce the States to lift a finger." *Id.* at 25a (quoting 156a). But the *en banc* court elided the key premise for *Christie I*'s conclusion: "we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Id.* at 158a. That, of course, was the statutory holding that the *en banc* court had just described as "too facile" and had "excise[d]" as "unnecessary dicta." *Id.* at 23a. Yet, absent that statutory construction, the *Christie I* panel would have "agreed with Appellants" that PASPA would "permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" *Ibid.* (quoting *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)).

Judge Fuentes, Judge Restrepo, and Judge Vanaskie dissented. Judge Fuentes, joined by Judge Restrepo, defended the excised statutory holding of *Christie I*, criticizing the majority's attempt to "infer[]" authorization by law from a repeal that did not "grant . . . permission" to anyone and left "no laws governing sports wagering" at certain locations. Pet. App. 28a, 31a. "Any other interpretation would be reading the phrase 'by law' out of the statute." *Id.* at 28a.

Judge Vanaskie dissented separately, explaining that his "skepticism" about PASPA's constitutionality—first expressed in his dissent in *Christie I*, *see* Pet. App. 178a—was "validated by today's majority opinion," *id.* at 35a. "The bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities," he wrote, "cannot be evaded by the false assertion that PASPA affords the States some undefined options." *Id.* at 36a. Under the *en banc* majority's opinion in *Christie II*, Judge Vanaskie predicted, "no repeal of any kind will evade the command that no State 'shall . . . authorize by law' sports gambling." *Id.* at 42a. This Court, he said, "has never considered Congress' legislative power to be so expansive." *Id.* at 45a.

SUMMARY OF ARGUMENT

I. PASPA's prohibition of New Jersey's 2014 Repeal violates the anti-commandeering principle and is thus unconstitutional.

A. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability

to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. This Court in *New York* traced the development of this principle back to the Founding. In drafting the Constitution, the Framers sought to remedy a flaw in the Articles of Confederation—that the federal government acted "only upon the States" rather than "directly upon the citizens." *Ibid.* (quoting *Lane Cty.* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)). The Constitution "substitut[ed] a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." *Lane Cty.*, 74 U.S. at 76. Congress thus lacks the authority to "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

This prohibition on Congress commandeering state governments is crucial to maintaining the "Constitution's division of authority between federal and state governments." *New York*, 505 U.S. at 175. When Congress dictates the content of state law, it undermines the responsiveness of state governments to their electorates, blurs the lines of accountability between the citizens and their state and federal governments, and disrupts the balance between those governments that protects individual liberty. *Id.* at 188; *Printz*, 521 U.S. at 922.

B. A federal ban against States repealing their own state-law prohibitions violates the anti-commandeering principle no less than a federal command to enact those prohibitions. In either case, "the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant*, 309 F.3d at 646 (Kozinski, J., concurring). That the anti-commandeering principle

applies to federal laws framed as prohibitions on state action is confirmed by this Court's precedents and amply supported by the principle's underlying values of responsiveness, accountability, and diffusion of sovereign power. It also accords with common sense; the Third Circuit itself recognized that "many affirmative commands can be easily recast as prohibitions." Pet. App. 160a.

C. Because PASPA's prohibition of the 2014 Repeal requires New Jersey to "govern according to Congress' instructions," *New York*, 505 U.S. at 162, it violates the anti-commandeering principle. PASPA not only requires States to maintain their prohibitions against sports wagering; the lower courts' injunction effectively requires New Jersey's Executive to re-impose a ban on sports wagering that no longer exists as a matter of state law. PASPA thus commandeers New Jersey's regulatory authority every bit as much as a federal command to enact a state-law prohibition in the first instance, and accordingly presents a violation of the anti-commandeering principle even more egregious than that in *New York*.

The court of appeals' conclusion that PASPA could be upheld because it "does not command states to take affirmative actions, and it does not present a coercive choice," Pet. App. 23a, is premised on the notion that PASPA allows New Jersey alternative avenues to legalize sports wagering. That contradicts the plain language and history of PASPA, which was intended to forestall further legalization of sports wagering by the States. And it ascribes to the Congress that enacted PASPA the patently absurd intention to give

States wide latitude to repeal their state-law prohibitions—even *all* such prohibitions—while at the same time prohibiting them from *licensing* the activity.

But even if one entertained the court of appeals' view that PASPA permits certain repeals that do not have too much "authorizing effect," Pet. App. 24a, that still would leave New Jersey with no realistic option to legalize sports wagering *at casinos and racetracks*. Particularly against the background that PASPA does not permit States to license sports wagering, the "option" of an undifferentiated repeal presents States not with a "choice" but "compulsion" that "runs contrary to our system of federalism." *Nat'l Fed'n of Indep. Bus. (NFIB)* v. *Sebelius*, 567 U.S. 519, 578 (2012).

The Third Circuit's efforts to draw support from this Court's other anti-commandeering cases fall flat. *South Carolina* v. *Baker*, 485 U.S. 505 (1988), and *Reno* v. *Condon*, 528 U.S. 141 (2000), each involved regulation of States under generally applicable federal laws that, unlike PASPA, did "not require the States in their sovereign capacity to regulate their own citizens." *Reno*, 528 U.S. at 151. This Court's cooperative federalism cases, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982), are even more clearly inapposite. Cooperative federalism gives States "the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167. Because there is no system of "federal regulation" of sports wagering, States do not have the option of ceding the field to the federal government. PASPA instead gives States only the unconstitutional "choice" "to regulate pursuant to Congress'

instructions in any number of different ways." *Id.* at 176–77. That is not cooperative federalism. It is commandeering.

II. PASPA's prohibition on States repealing their own laws cannot be severed from the statute. Severability is a question of "legislative intent." *Randall* v. *Sorrell*, 548 U.S. 230, 262 (2006). It cannot be seriously maintained that Congress would have prohibited States from *licensing* or otherwise *regulating* sports wagering had it known that States, under PASPA, would be free to permit the activity; there is no reason to think that the Congress that enacted PASPA wanted to court *unregulated* sports wagering. All of Section 3702(1)'s prohibitions therefore must fall. And because Section 3702(2)'s prohibition on individual participation in sports wagering "pursuant to the law or compact" of a State is textually tethered to Section 3702(1)'s antecedent and impermissible prohibition against state "authorization by law or compact," it, too, must fall.

ARGUMENT

In *New York* v. *United States* and *Printz* v. *United States*, this Court articulated, and affirmed, a simple principle central to our system of government: "'[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts,'" or otherwise to "'regulate state governments' regulation of interstate commerce.'" *Printz*, 521 U.S. at 924 (quoting *New York*, 505 U.S. at 166). That is the anti-commandeering principle, and it is fundamental to a system of shared sovereignty.

In 2012, in response to its citizenry's urgent demands to decriminalize and regulate sports wagering, New Jersey attempted to do so in a responsible manner—through a system of licensing and close supervision of the activity. That, not coincidentally, is how Nevada currently regulates the activity, and it is what Congress had in PASPA itself imposed as a condition for legalized sports wagering in Atlantic City. In *Christie I*, the Third Circuit struck down New Jersey's regulatory regime as "licensing" and "authorization by law" prohibited by PASPA, but, in accordance with the Leagues' arguments, also held that PASPA did not "prohibit New Jersey from repealing its ban on sports wagering." Pet. App. 158a. In urging denial of the State's petition for certiorari, the United States likewise reassured this Court that New Jersey remained free to repeal its prohibitions on sports wagering "in whole or in part." JA197.

Since then, Proteus-like, the Leagues', the United States', and the lower courts' construction of PASPA has changed again and again to avoid answering the question pressed by New Jersey's citizens of what the State can do to legalize sports wagering within its borders. Indeed, the Third Circuit's current permutation—that PASPA permits States to repeal their own laws unless the repeal has too much "authorizing effect"—is so slippery that the Third Circuit itself doubted that "a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA . . . could be drawn." Pet. App. 24a. The court of appeals could not even say for sure that a repeal of prohibitions limited to "*de minimis* wagers between friends and family" would pass muster. *Ibid.* New Jersey is left to legislate in accordance with the

elusive and essentially meaningless aphorism that "not all repeals are created equal." *Ibid.*

Our Constitution does not leave the "division of authority between the Federal Government and the States" to such indeterminate vagaries. *New York*, 505 U.S. at 149. The history and structure of the Constitution and this Court's cases all establish that Congress has no power at all to require States to prohibit conduct under state law. The lower courts' injunction here demonstrates beyond cavil that *that* is what PASPA's ban on "authorization by law" does. That is unconstitutional. And because PASPA cannot function as Congress intended without its unconstitutional requirement that States take legislative and executive actions to prohibit sports wagering, the statute must be stricken in its entirety.

I. CONGRESS CANNOT PROHIBIT NEW JERSEY'S REPEAL OF ITS STATE-LAW PROHIBITIONS ON SPORTS WAGERING.

Because "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States," Congress may not "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166. This limit on congressional authority precludes the federal government from commanding States to enact state laws concerning commerce, and for all the same reasons, denies to the federal government the power to compel States to maintain such laws in effect by prohibiting their repeal. PASPA's prohibition of New Jersey's 2014 Repeal requires New Jersey to maintain in force its state-law prohibitions on sports wagering at casinos and racetracks. The lower courts' injunction

makes that plain. Congress could prohibit sports wagering itself, if it wished to do so, but it cannot compel New Jersey to do it in the service of Congress's objective of forestalling further legalization of sports wagering.

The Third Circuit reached a contrary result by limiting the anti-commandeering principle's application to cases in which Congress compels an "affirmative act" either directly, by mandating certain conduct, or indirectly, by putting States to a "coercive binary choice." Pet. App. 23a. But this Court's cases impose no such formalistic limitation on the anti-commandeering principle, and a limitation that excludes federal prohibitions of repeals of state law would be divorced from the principle's rationales of promoting responsiveness and accountability in governments and diffusion of sovereign power. In any event, by requiring New Jersey to maintain in force its state-law prohibitions against sports wagering, PASPA *is* requiring an affirmative exercise of the State's proscriptive powers. That is what PASPA does, and it is unconstitutional.

A. Congress May Not Require States To Regulate Their Citizens.

It is fair to say that very little is more central to our system of government than the division of authority between the States, as sovereigns, and the central national government, as a sovereign. In *New York* v. *United States*, this Court reviewed over two centuries of history and precedent to "ascertain[] the constitutional line between federal and state power." 505 U.S. at 155. In so doing, the Court concluded that whether

framed as a question of the scope of Congress's Article I powers or the protection of state sovereignty recognized by the Tenth Amendment, the answer is the same: "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. Thus, "state legislatures are *not* subject to federal direction." *Printz*, 521 U.S. at 912. This fundamental understanding of the division of authority between the state and federal governments is dictated by the historical record, enshrined in our constitutional structure, and long recognized by this Court.

1. The anti-commandeering principle has its roots in the debates of the Framers on the scope of federal power under the Constitution. Under the Articles of Confederation, the federal government had acted "only upon the States" rather than "directly upon the citizens," *New York*, 505 U.S. at 162 (quoting *Lane Cty.*, 74 U.S. at 76), which was both "ineffectual and provocative of federal-state conflict," *Printz*, 521 U.S. at 919. Alexander Hamilton described this arrangement as the "great and radical vice in the construction of the existing Confederation." *New York*, 505 U.S. at 163 (citing *The Federalist No. 15*, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

At the Constitutional Convention, the Framers debated two plans—the New Jersey Plan and the Virginia Plan—to improve upon the Confederation's governmental structure. Eventually, the New Jersey Plan, which called for federal laws to be "carried into execution by the judiciary and executive officers of their respective states" was rejected. *New York*, 505 U.S. at 164. Instead, the Convention adopted the Virginia Plan, which called for Congress to "exercise its

legislative authority directly over individuals rather than over States." *Id.* at 165. The Framers' decision to relinquish control over States in favor of control over individuals was impelled by their beliefs that "a sovereignty over sovereigns, a government over governments . . . is subversive of the order and ends of civil polity," *id.* at 180 (quoting *The Federalist No. 20*, at 138 (Alexander Hamilton & James Madison) (Clinton Rossiter ed., 1961)), and that, to be effective, "[l]aws . . . must not be laid on states, but upon individuals," *id.* at 165 (citing 2 J. Elliot, *Debates on the Federal Constitution* 56 (2d ed. 1863)).

That the Constitution limited federal power in this way had been recognized long before *New York*. In 1868, the Court held that, through the Constitution, the people "substitut[ed] a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States." *Lane Cty.*, 74 U.S. at 76. And forty years later, the Court held that Congress could not properly deprive a State of the "power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose." *Coyle* v. *Smith*, 221 U.S. 559, 565 (1911) (cited in *New York*, 505 U.S. at 162). As the Court explained in *New York*, the Court had "consistently respected th[e] choice" of the Framers to adopt a Constitution that "confers upon Congress the power to regulate individuals, not States." 505 U.S. at 166.

In *New York*, this Court drew from that history and precedent what has come to be known as the anti-commandeering principle. The Court in *New York*

considered the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985. As construed by the Court, that statute gave the States the choice either to "provide for the disposal of low level radioactive waste generated within their borders" or to suffer three sets of "incentives." 505 U.S. at 168–69. The third of these incentives was a command to "tak[e] title to the waste generated within the State," thereby "becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly." *Id.* at 168–69, 174–75.

The Court considered whether either the direct command to "provide for the disposal" of the waste or the "take title" incentive, if ordered by Congress as a stand-alone measure, would be constitutional. A federal order to provide for disposal of the waste, the Court readily concluded, was simply a command to "regulat[e] pursuant to Congress' direction," and "the Constitution," the Court held, "does not empower Congress to subject States to this type of instruction." *New York*, 505 U.S. at 176. An alternative directive that the States take title to the waste would "in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers" that "would 'commandeer' state governments into the service of federal regulatory purposes." *Id.* at 175. That, too, would "be inconsistent with the Constitution's division of authority between federal and state governments." *Ibid.* Because neither alternative would be constitutional if enacted as a direct command, the Court held that Congress also "lack[ed] the power to offer the States a choice between the two." *Id.* at 176. As a result, the Court invalidated the take-title incentive.

The Court elaborated on the anti-commandeering principle five years later in *Printz*. There, the Court considered portions of the Brady Handgun Violence Prevention Act, which "command[ed] state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks." 521 U.S. at 902. The Court reaffirmed *New York*'s extensive historical analysis, observing that "'the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.'" *Id.* at 920 (quoting *New York*, 505 U.S. at 166). Accordingly, the Court explained, Congress "may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 925.

The Court in *Printz* declined to limit the anti-commandeering principle based on the Government's proffered "distinction between 'making' law and merely 'enforcing' it, between 'policymaking' and mere 'implementation.'" 521 U.S. at 927. The Court observed that such a distinction would require it to determine how much policymaking "is too much"—a question that "is not likely to be answered precisely"—and concluded that such "an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one." *Id.* at 928. As a result, the Court held in *Printz* that just as "Congress cannot compel the States to enact or enforce a federal regulatory program," it also "cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935.

2. The anti-commandeering principle protects our federalist system of government—and the individual liberty that system is intended to secure—in at least three ways: First, the principle ensures that each

level of government remains responsive to the wishes of its respective constituency. Second, the principle ensures that state and federal officials remain accountable for their own conduct. Finally, the principle produces a diffusion of power across multiple sovereigns, which "reduce[s] the risk of tyranny and abuse from either." *Printz*, 521 U.S. at 921.

a. Preserving the responsiveness of each government was a central concern in *New York*. The Court acknowledged, of course, that Congress could "encourag[e] a State to conform to federal policy choices," such as by placing "'conditions on the receipt of federal funds,'" *New York*, 505 U.S. at 167, 168 (quoting *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987)), or through a cooperative federalism approach of offering "States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 167.

But under either form of encouragement, a State would remain ultimately responsive to its citizens. If Congress encourages compliance with federal programs through its spending power, a State may nonetheless "elect to decline a federal grant" if the "State's citizens view federal policy as sufficiently contrary to local interests." *New York*, 505 U.S. at 168. Similarly, under a cooperative federalism program, "state residents . . . may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program." *Ibid.* In either event, "state governments remain responsive to the local electorate's preferences." *Ibid.*

Protection of the States' responsiveness to their citizens aligns with the Framers' vision of the States

as agents of dissent, able to enact policies "unfriendly to the national government" but "generally popular in the State." *The Federalist No. 46*, at 304 (James Madison) (Clinton Rossiter ed., 1961). And indeed, in recent years, States repeatedly have responded to the wishes of their citizens by enacting policies in areas including medical marijuana, immigration, and surveillance that might be viewed as "unfriendly" to those of the national government. *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. Pa. L. Rev. 103, 127–29 (2012).

b. The anti-commandeering principle also serves the important purpose of ensuring that citizens know whom to hold accountable for unpopular policies. The "theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the federal government; the second between the citizens and the States." *United States* v. *Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). Where "the boundaries between the spheres of federal and state authority . . . blur," the "resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.* at 577. As this Court explained in *New York*, when Congress dictates state policy, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. And by foisting "the financial burden of implementing a federal regulatory program" on the States, "[m]embers of Congress can take credit for 'solving'

problems without having to ask their constituents to pay for the solutions with higher federal taxes," while the state officials may be forced to "tak[e] the blame for [a federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

c. The anti-commandeering principle is also essential to securing individual liberty. As this Court put it, "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities . . . . To the contrary, the Constitution divides authority between the federal and state governments for the protection of individuals." *New York*, 505 U.S. at 181. By protecting the sovereignty of the States while also strengthening the federal government, the Framers envisioned that "[t]he different governments will control each other," allowing individual liberty to flourish. *Printz*, 521 U.S. at 922 (citing *The Federalist No. 51*, at 323 (James Madison) (Clinton Rossiter ed., 1961)). A State that can be commandeered by the federal government can provide no useful check against "'tyranny and abuse.'" *Id.* at 921 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)).

* * *

The anti-commandeering principle is thus both simple and vital: to preserve the separate sovereignty of States—and the benefits that sovereignty provides within our federal system—Congress is limited to exercising "its legislative authority directly over individuals rather than over States." *New York*, 505 U.S. at 165. Although congressional attempts to exceed this authority are relatively new, this Court's recognition of the limits on Congress's authority is not. *Printz*,

521 U.S. at 925–26. "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162.

B. A Federal Enactment That Prohibits States From Repealing State-Law Prohibitions Violates The Anti-Commandeering Principle.

1. It is well established that Congress lacks the power to compel States to enact state laws. "[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC*, 456 U.S. at 761–62. And, indeed, "no Member of the Court has ever suggested" that Congress could "command a state government to enact *state* regulation." *New York*, 505 U.S. at 178.

A federal prohibition against States' repeals of their own laws violates the anti-commandeering principle just the same. As Judge Kozinski explained in a concurrence, from the standpoint of state sovereignty, "preventing [a] state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant*, 309 F.3d at 646; *see also Wilderness Soc'y v. Kane Cty.*, 581 F.3d 1198, 1238 (10th Cir. 2009) (McConnell, J., dissenting) ("California has the right to legalize conduct for purposes of state law that the federal government makes illegal."); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1448 (2009) (arguing that distinguishing a command to enact legislation

from a prohibition on repeal of similar legislation creates an "arbitrary result"). Indeed, in *Christie I*, the Third Circuit acknowledged that a federal prohibition "stopping the states 'from repealing an existing law,'" would "permit Congress 'to accomplish exactly what the anti-commandeering doctrine prohibits,'" Pet. App. 158a (quoting *Conant*, 309 F.3d at 646)—federal regulation of "state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166.

The court of appeals nevertheless drew from this Court's focus in *New York* and *Printz* on "enact[ing]" and "enforc[ing]" legislation the notion that the anti-commandeering principle is implicated only when the federal government requires a State to perform "affirmative actions," and is not similarly implicated by a mere "prohibition" on state action. Pet. App. 20a, 23a. But this formalistic view of the anti-commandeering principle is irreconcilable with this Court's cases. Indeed, *Reno* v. *Condon* involved a federal "prohibition" that required "affirmative action" on the part of the State in order to comply, but the Court nevertheless rejected South Carolina's commandeering argument. 528 U.S. 150–51. The Court held that the commandeering analysis turned not on whether the federal law required affirmative action on the part of the State but instead on whether the federal law sought to "control or influence the manner in which States regulate private parties" and thereby "require[d] the States in their sovereign capacity to regulate their own citizens." *Ibid.*

Similarly, in *Coyle*, this Court declined to enforce a federal law providing that the location of Oklahoma's capital "shall not be changed," even though

Oklahoma's compliance with that mandate did not require any action on the part of the State. 221 U.S. at 564–65. In the Third Circuit's formulation, the federal law did not require Oklahoma to "lift a finger," Pet. App. 25a, but the Court nevertheless concluded that the federal law at issue impermissibly restricted Oklahoma's sovereignty by requiring Oklahoma to "govern a cording to Congress' instructions." *New York*, 505 U.S. at 162 (citing *Coyle*, 221 U.S. at 565).

Indeed, the Third Circuit itself in *Christie I* recognized that "many affirmative commands can be easily recast as prohibitions." Pet. App. 160a. For example, as *Christie I* explains, the background check requirement in *Printz* readily could be "recast" as a prohibition against States "issuing handgun permits unless background checks are conducted by their officials." *Ibid.* There accordingly is no basis in either law or logic for the court of appeals' confinement of the anti-commandeering principle to federal laws mandating "affirmative acts" by the States.

In any event, even if it were true that a State is not commandeered unless the federal government requires the State to perform an affirmative act, a prohibition against the repeal of a state law indisputably operates as a requirement to *maintain* that law, and "keep[ing] the prohibition on the books," Pet. App. 23a, is itself an affirmative act by the State.

The "right to do that which is not prohibited derives . . . from the inherent rights of the people." Pet. App. 7a. For a State to keep a prohibition "on the books" necessarily requires the State to employ its sovereign authority on a continuing basis to proscribe that conduct. And, state constitutions, in fact, oblige

state officers to enforce the laws that are on the books. But even if a State never takes a step to enforce its proscription, the continuing act of making conduct unlawful unquestionably is an affirmative exercise of its sovereignty.

2. Disabling Congress from prohibiting States from repealing their own laws accords with the central purpose of the anti-commandeering principle: respecting and maintaining the sovereign status of States within our federalist system and preventing them from becoming the "'puppets of a ventriloquist Congress.'" *Printz*, 521 U.S. at 928 (quoting *Brown* v. *EPA*, 521 F.2d 827, 839 (9th Cir. 1975)). And it likewise fosters the values of responsiveness, accountability, and individual liberty that the anti-commandeering principle serves to protect.

When the federal government enacts legislation in an area of concern to a State, the state government can be responsive to its citizens only so long as it retains "the ultimate decision as to whether or not the State will comply" with a federal policy choice. *New York*, 505 U.S. at 168. But where the State has no choice but to maintain a law that its citizens wish to repeal, the State is no more "responsive to the local electorate's preferences" than it would be if federal law required the State to enact in the first instance a law the electorate abhorred. *Ibid.*

Similarly, for Congress to bar States from repealing a law presents at least as great a threat to accountability as requiring States to enact a law. Whether Congress compels the enactment of a state law, or its maintenance on the books, state officials will "bear the brunt of public disapproval," *New York*,

505 at 169, while the federal government bears none of the political or economic costs of its mandate.

Finally, allowing the federal government to command the States to keep state-law prohibitions in place deeply undermines their ability to act as a check against the federal government, and thus endangers the individual liberty our federalist system is intended to secure. Indeed, a federal power to command States to maintain state-law prohibitions would be utilized principally—if not exclusively—to foreclose States' efforts to enlarge the individual liberty of their citizens.

The policies underlying the anti-commandeering principle require symmetry in the treatment of federal prohibitions against repeals of state laws and federal directives to enact them because both dictate the content of state laws. In each case, in equal measure, Congress is conscripting "state governments into the service of federal regulatory purposes," and "requir[ing] the States to govern according to [its] instructions." *New York*, 505 U.S. at 162, 175.

C. PASPA's Prohibition Of New Jersey's 2014 Repeal Violates The Anti-Commandeering Principle.

PASPA's prohibition of New Jersey's 2014 Repeal requires New Jersey to "govern according to Congress' instructions," *New York*, 505 U.S. at 162, and thus violates the anti-commandeering principle. This is demonstrated conclusively by the lower courts' injunction, which directly commands New Jersey's Executive to re-impose prohibitions the State's Legislature had repealed. And it is further confirmed by PASPA's assault on each of the values the anti-commandeering

principle serves to protect, as well as the absence of *any* similar federal laws barring States from repealing their own state-law prohibitions. The Third Circuit's contrary holding misconstrues both PASPA and this Court's cases.

1. PASPA Impermissibly Requires New Jersey To Prohibit Sports Wagering At Casinos And Racetracks.

There should be no dispute that, as construed by the Third Circuit here, PASPA prohibits New Jersey from lifting its state-law prohibitions on sports wagering at casinos and racetracks, and therefore requires New Jersey to maintain those state-law prohibitions in effect. That suffices to establish that PASPA violates the anti-commandeering principle. The federal ban on the repeal of the state-law prohibitions dictates the contents of state law no less than a federal requirement to enact the state-law prohibitions in the first instance.

Any conceivable doubt on that score is obliterated by the lower courts' injunction, which prohibits the State's Executive from "giving operation or effect" to the 2014 Repeal. Pet. App. 113a. The clear thrust of the injunction is to require the State's Executive to maintain (and presumably enforce) the state-law prohibitions on sports wagering at casinos and racetracks lifted by the 2014 Repeal. But from the moment the 2014 Repeal was enacted, as far as New Jersey law was concerned, those state-law prohibitions were "considered . . . as if [they] never existed." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868); *see also* Pet. App. 30a. The injunction thus operates as a direct command to the State's Executive to re-impose the

stricken prohibitions—something "no Member of the Court has ever suggested" would be permissible in our federalist system. *New York*, 505 U.S. at 178. It requires New Jersey's Executive to use the force of his office to make sports wagering at New Jersey casinos and racetracks once again illegal, notwithstanding the absence of any state law prohibiting the conduct.

This case thus presents a more egregious violation of the anti-commandeering principle than even that in *New York*. Here, there is not only a federal statute—PASPA—that requires "the States to govern according to Congress' instructions," *New York*, 505 U.S. at 162; there also is a federal-court injunction actually dictating the contents of the State's prohibitions to ensure that they accord with those congressional instructions. And the injunction accomplishes that by conscripting the State's Executive's law enforcement authority. The Third Circuit's decision thus leaves States subject not only "to federal direction," *Printz*, 521 U.S. at 912, but, indeed, to outright federal takeover.

That cuts to the vital core of the reserved sovereignty of the States. This Court recognized in *FERC* that "the ability of a state legislative . . . body . . . to consider and promulgate regulations of its choosing" is a "quintessential attribute of sovereignty" that is "central to a State's role in the federal system." 456 U.S. at 761; *see also Printz*, 521 U.S. at 972 n.1 (Souter, J., dissenting) (the "decision on what the law should be" is "[t]he core power of a legislator"; thus "a legislator may not be ordered to exercise discretion in a particular way"). Implicit in that "quintessential attribute of sovereignty" is the "ability of a state legisla-

tive . . . body" to *withdraw* the regulations it previously had promulgated. *FERC*, 456 U.S. at 761. PASPA strips States of that ability, "damaging the legislative power as such," *Printz*, 521 U.S. at 972 n.1 (Souter, J., dissenting), and thus impairs States in their ability to fulfill their role in the "federal system" created by the Framers, *FERC*, 456 U.S. at 761.

PASPA also deeply undermines the values safeguarded by the anti-commandeering principle. The statute obviously and directly prevents New Jersey officials from being "responsive to the local electorate's preferences," *New York*, 505 U.S. at 168, because it compels them to maintain in force state-law prohibitions that New Jersey citizens—directly and through a super-majority of their elected representatives—repeatedly have expressed their desire to withdraw. Under the lower courts' injunction, New Jersey's Executive is made to look not only unresponsive, but, indeed, hostile to the citizens' wishes, as he must quixotically hold in place those prohibitions *in spite of the Legislature's repeal of those measures*. And, as if that were not enough to make New Jersey officials look unresponsive, those officials are compelled to maintain their prohibitions here against the backdrop of the Third Circuit's disingenuous claim that PASPA actually affords States ample "room . . . to craft their own policies." Pet. App. 23a.

PASPA also scrambles the lines of accountability between the people of New Jersey and their respective state and federal sovereigns by compelling New Jersey officials to maintain unwanted state-law prohibitions. Because PASPA requires these prohibitions to be maintained as a matter of *state law*, New Jersey's Executive is "put in the position of taking the blame"

from the public for the continued existence of the prohibitions and their many "defects," thereby shielding federal officials from their political costs. *Printz*, 521 U.S. at 930. Those federal officials, meanwhile, are able to curry favor with the Leagues at "no cost to the federal government." S. Rep. 102-248, at 10.

Finally, PASPA and the lower courts' injunction self-evidently diminish New Jersey's ability to provide greater individual liberty for its citizens in the area of sports wagering. But that is not all. If the federal government may convert to its own end the lawmaking function of the State, as it has done here, there can be no "diffusion of sovereign power" of the type envisioned by the Framers, and "the liberties that derive from" that diffusion undoubtedly and soon will shrivel. *New York*, 505 U.S. at 181.

That PASPA's prohibition of New Jersey's 2014 Repeal presents in such stark relief all of the evils the anti-commandeering principle guards against confirms that it is unconstitutional.

And so does the absence of any precedent for PASPA's prohibition against a State repealing its own state-law prohibitions. Like the take-title provision in *New York*, PASPA "appears to be unique." 505 U.S. at 177. In five years of litigation, neither the Leagues nor the United States has identified any other federal statute that purports to prohibit States from repealing their own state-law prohibitions—much less a federal law that has been enforced to require state officials to "give effect" to repealed state laws. That Congress has acted here in a way that is unprecedented is itself a "telling indication of [a] severe constitutional

problem." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 505 (2010).

2. The Third Circuit's Construction Of PASPA Is Incorrect And Commandeers In Any Event.

The court of appeals did not dispute that a federal law that required States to maintain state-law prohibitions would impermissibly commandeer. But the court concluded that PASPA does not require New Jersey "to affirmatively keep the prohibition on the books" but rather permits States "to choose among many different potential policies on sports wagering." Pet. App. 23a. That holding is grounded on a manifestly incorrect construction of PASPA's prohibition on "authoriz[ation] by law" and misapprehends the scope of the anti-commandeering principle's limit on congressional power.

a. *PASPA Requires States To Maintain Their Prohibitions Against Sports Wagering.*

PASPA does not allow States "to choose among many different potential policies on sports wagering." Pet. App. 23a. Correctly construed, PASPA does not give States any choice at all; it is a direct command to States to maintain their state-law prohibitions.

The notion that PASPA permits States avenues to repeal their state-law prohibitions on sports wagering was first invented by the Leagues in 2012 as a response to New Jersey's anti-commandeering argument. Since that time, like a chameleon, the response has continually morphed to fit its surroundings. First, PASPA permitted repeals "in whole or in part,"

JA197, but as soon as the 2014 Repeal was enacted, suddenly the Leagues said only "complete deregulation" was permitted, JA100. When the United States rejected that construction, the Leagues shifted to suggesting that a State possibly could "prohibit[] some but not all forms of sports gambling," so long as the State's repeal was not a "de facto authorization." JA415–16. And now, the Third Circuit has concluded that PASPA *might* allow a repeal that permits only "*de minimis* wagers between friends and family" because such a repeal supposedly would have only limited "authorizing effect." Pet. App. 24a. So, in its current incarnation, PASPA's prohibition against "authoriz[ation] by law" permits a State to either keep in force all of its state-law prohibitions against sports wagering, repeal its prohibitions in part so long as the repeal does not have too much "authorizing effect," or repeal *all* of its prohibitions, which apparently would have no "authorizing effect" at all.

But as this Court observed in *Printz*, "[h]ow much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one." 521 U.S. at 928. And surely a federal court's discernment of a state statute's "authorizing effect" (whatever the Third Circuit meant by that) is at least as "imprecise" as the standard of "too much" "policymaking" that this Court rejected in *Printz*. *Ibid.* As New Jersey's recent efforts to legalize sports wagering well illustrate, under the Third Circuit's "authorizing effect" standard, States have no way of knowing what prohibitions of sports wagering PASPA permits them to repeal.

But Congress did not enact such a hopelessly indeterminate statute. Far from it: PASPA prohibits

States from legalizing sports wagering, period. This is how PASPA was understood for the first twenty years of its existence. Indeed, when one of the Leagues previously sought to enforce PASPA to block Delaware's effort to expand its sports-based lottery, that League described PASPA as "bann[ing] sports betting in States that had not authorized such schemes in the past." Br. of Appellees at 2, *Office of the Comm. of Baseball* v. *Markell*, No. 09-3297 (3d Cir. Aug. 17, 2009). And before they were faced with New Jersey's commandeering challenge, the Leagues similarly described PASPA as imposing a "broad ban on sports betting." Complaint ¶ 4, *Nat'l Collegiate Athletic Ass'n* v. *Gov. of N.J.* (*Christie I*), No. 12-4947 (D.N.J. Aug. 7, 2012) (ECF No. 1).

This reading is confirmed by the statute's text. As the court of appeals observed, the word "authorize" can be defined to reach any circumstance where the legislature "permit[s] a thing to be done in the future." Pet. App. 13a (quoting Black's Law Dictionary 133 (6th ed. 1990)). Other dictionaries are in accord. *See, e.g.*, Webster's Third New Int'l Dictionary at 146 (1992) ("permit by or as if by some recognized or proper power"). That broad definition does not appear to permit *any* repeals of state-law prohibitions on sports wagering, much less a "complete repeal" of *all* state-law prohibitions on sports wagering. *See* Pet. App. 24a; *see also id.* at 71a (Fuentes, J., dissenting) ("If withdrawing prohibitions on 'some' sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law.").

This plain-language reading of PASPA's prohibition on state "authorization by law" is well supported

by PASPA's legislative history and evident purpose. The federal government's objective in enacting PASPA was to prohibit further legalization of sports wagering among the States. Indeed, the primary sponsors of the legislation described the statute as imposing a blanket ban on legalized sports wagering. *See, e.g.*, 138 Cong. Rec. S7274-02, 1992 WL 116822 (daily ed. June 2, 1992) (statement of Sen. DeConcini) ("Except for certain States, sports gaming in amateur and professional sports will be barred."); 138 Cong. Rec. S17434-01, 1992 WL 275344 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley) (explaining that PASPA "prohibited" a State "from allowing sports betting"); 138 Cong. Rec. H11757 (daily ed. Oct. 5, 1992) (statement of Rep. Brooks) (describing PASPA's purpose as being to "stop the spread of *legalized gambling* on sports events") (emphasis added).

The report of the Senate Judiciary Committee likewise described the legislation as an effort to forestall the "[w]idespread *legalization* of sports gambling." S. Rep. 102-248, at 5 (emphasis added); *see also id.* at 13 (statement of Sen. Grassley) (observing that under PASPA, "three States would be granted a Federal monopoly on lawful sports wagering to the exclusion of the other 47 States"). The committee report invokes the football commissioner's worry that "*legalized* sports gambling would change . . . the way [NFL games] are perceived," the baseball commissioner's concern about "the moral status of sports gambling [being] redefined by *legalization*," and a former FBI agent's suggestion that expanded legal sports wagering might "draw new recruits to illegal gambling." *Id.* at 4, 7 (emphases added). Indeed, the brief committee

report invokes the threat of "legalized" sports gambling (or other variants of "legalize") ten separate times. *Id.* at 4–8. That preoccupation with the threat of "legalized" sports wagering seems to have been misplaced, insofar as the NFL and NHL now or soon will have teams in Las Vegas, and the commissioner of a third League has publicly announced his support for legalized sports wagering. *See* Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times, Nov. 13, 2014, at A27. But in any event, Congress's expressed concerns about "legalized" sports wagering are utterly irreconcilable with a legislative result that permits States to *lift all prohibitions* against sports wagering.

Yet under the counter-intuitive reading of PASPA advanced by the Leagues and adopted by the court of appeals, this statute not only permits States to withdraw all of their prohibitions on sports wagering, it also simultaneously prohibits States from "licens[ing]" that activity or regulating it in any other way that would be deemed "authorizing [it] by law." The Leagues would have the Court believe that Congress, through PASPA, was courting vast amounts of legal, but unlicensed and unregulated sports wagering. That is a bizarre intention to ascribe to a Congress that purported to be concerned about the "integrity of our national pastime." S. Rep. 102-248, at 4.

And, in fact, it is sharply at odds with another of PASPA's provisions. In the one instance in which Congress clearly permitted a State to legalize sports wagering—the one-year window New Jersey was provided to "authorize[]" sports wagering in Atlantic City—such legalization was permitted only "pursuant to a comprehensive system of State regulation authorized by that State's constitution." 28 U.S.C.

§ 3704(a)(3)(B); *see also* 138 Cong. Rec. H11757 (daily ed. Oct. 5, 1992) (statement of Rep. Hughes) (explaining that New Jersey has had a "*highly regulated*, legalized gambling industry in place in Atlantic City since 1978") (emphasis added). The text of PASPA itself thus demonstrates that where sports wagering was to be legalized, Congress intended for it to be regulated by the State. PASPA's ban on state licensing of sports wagering can be squared with that intent only if the statute also prohibits legalization of the activity by the States.

Constitutional avoidance is a powerful tool of statutory construction, but it is available only where the statute in question is ambiguous and the alternative construction is reasonably plausible. *See McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015). Here, PASPA's prohibition on "authoriz[ation] by law" is not ambiguous—it prohibits laws that permit sports wagering. The Third Circuit's construction, which necessarily permits States to completely repeal their prohibitions on sports wagering while banning States from licensing the activity, is at odds with the text, history, and evident purpose of the statute.

PASPA bans States from legalizing sports wagering, and the Third Circuit therefore was wrong to conclude that PASPA does not require New Jersey "to affirmatively keep the prohibition on the books." Pet. App. 23a.

b. *PASPA Impermissibly Commandeers Even Under The Third Circuit's Construction.*

The Third Circuit's construction would not avoid the commandeering problem here in any event. Even if it were true that PASPA allows States undefined

"room" within which they may make policy concerning sports wagering, the Third Circuit's construction makes clear that PASPA leaves New Jersey no real option to lift its prohibition on sports wagering *at casinos and racetracks*. Whatever "room" the Third Circuit's ruling might leave to States would comprise, at most, a set of federally-approved options from which States could choose. That is requiring States to govern according to Congress's instructions, which the anti-commandeering principle does not permit.

The court of appeals claimed PASPA "allows states . . . many different potential options on sports wagering that do not include . . . affirmative authorization by the State." Pet. App. 23a. But at the same time, the court of appeals construed "authorization" to bar any repeal that "channels wagering activity to particular locations or operators." *Ibid.* That does not leave New Jersey with any option to legalize sports wagering at casinos and racetracks except repeals that are unlimited in terms of "location[]" or "operator[]." That would be, in substance, a "complete repeal." Yet as the court of appeals itself seemed to recognize, putting New Jersey to the choice of maintaining its prohibition on sports wagering at casinos and racetracks or repealing prohibitions on sports wagering at any location and as to all persons is unconstitutionally "coercive." *Id.* at 25a.

Indeed, whether one calls this "option" a "complete repeal" or something else, it is obvious that is not an "option" New Jersey possibly could accept. Given that PASPA does not permit States to license sports wagering, this option would require New Jersey to permit unlicensed and essentially unregulated sports wagering to take place anywhere in the State. No

responsible government could permit that state of affairs. This is not a "hard choice." It is a Hobson's choice that "amounts in reality to coercion" to accept the federal command to maintain in place the State's prohibition. *New York*, 505 U.S. at 162; *see also Petersburg Cellular P'ship* v. *Bd. of Supervisors of Nottoway Cty.*, 205 F.3d 688, 703 (4th Cir. 2000) (the options of complying with a federal statute or withdrawing totally from regulation is "not a choice at all" and "no less coercive than the choice offered the States in *New York*"). That type of "compulsion . . . runs contrary to our system of federalism." *NFIB*, 567 U.S. at 578.

Finally, even if PASPA could be construed to offer States a cognizable choice among several potentially acceptable paths to legalize sports wagering at casinos and racetracks (none of which could have too much "authorizing effect") the statute still would impermissibly commandeer the States' regulatory authority. Unless Congress leaves States the alternative to "decline to administer the federal program," providing States a menu of regulatory schemes from which they must choose just "enables the States to regulate pursuant to Congress' instructions in any number of different ways." *New York*, 505 U.S. at 176–77.

Here, PASPA provides New Jersey no option to cede the field to federal authorities. Instead New Jersey *must* structure its state laws concerning sports wagering to meet federal requirements—either by completely prohibiting sports wagering or otherwise adopting some sort of scheme that does not have too much "authorizing effect." The "choice" presented by this strained construction of PASPA thus is precisely the type of choice that the Court struck down in *New*

York—a choice between two measures, neither of which Congress has the power to impose on a standalone basis. Since Congress can neither compel States to prohibit sports wagering, nor require them to regulate it in a particular way (without too much "authorizing effect"), giving States a choice between the two impermissible options is also impermissible. *See New York*, 505 U.S. at 176.

3. The Third Circuit's Reliance On This Court's Opinions In *Baker*, *Reno*, *Hodel*, And *FERC* Is Badly Misplaced.

The court of appeals viewed PASPA's prohibition on state "authoriz[ation] by law" as "more akin to those laws upheld in *Hodel*, *F.E.R.C.*, *Baker*, and *Reno*," than "those struck down by the Supreme Court in *New York* and *Printz*." Pet. App. 22a. Neither *Baker* nor *Reno*, which involved applications of generally applicable federal laws to a State, nor *Hodel* nor *FERC*, which involved instances of "cooperative federalism," even remotely support the Third Circuit's holding. To the contrary, they refute its reasoning at every turn.

a. *PASPA Is Not A Generally Applicable Law That Regulates States' Participation In Markets.*

The first category of cases invoked by the court of appeals to support its judgment concerned statutes it characterized as "prohibitions on state action." Pet. App. 18a (referring to *Baker* and *Reno*). The United States similarly described these cases as establishing Congress's authority to "regulate state activities." Br. of U.S. as *Amicus Curiae* at 15, *Christie* v. *Nat'l*

Collegiate Athletic Ass'n, Nos. 16-476 & 16-477 (U.S. May 2017).

The court of appeals and the United States mischaracterize *Baker* and *Reno* and misapply them to this case. In *Baker*, the Court considered the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which the Court treated "as if it directly regulated States by prohibiting outright the issuance of bearer [i.e., non-registered] bonds" by the States. 485 U.S. at 511. The Court nonetheless upheld the statute because the relevant section of TEFRA "regulates state activities" in the same manner as a private person rather than "seek[ing] to control or influence the manner in which States regulate private parties." *Id.* at 514. While States had to engage in legislative action to issue registered bonds, the Court held that such action was "an inevitable consequence of regulating a state activity." *Ibid.* Because South Carolina effectively sought an exemption "from generally applicable federal regulations," the Court concluded the case did not present a commandeering problem. *Ibid.* (quotations omitted); *see also New York*, 505 U.S. at 160 (describing *Baker* as addressing "the authority of Congress to subject state governments to generally applicable laws").

Reno presented similar issues. Congress enacted the Driver's Privacy Protection Act of 1994 (DPPA), which "regulate[d] the disclosure and resale of personal information contained in the records of state DMVs." 528 U.S. at 143. The DPPA did "not apply solely to States," but "also regulate[d] the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV." *Id.* at 146. The Court concluded that

although the statute imposed administrative burdens on the State, it did not impermissibly commandeer because "the DPPA does not require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151. Instead, the Court concluded that the DPPA simply "regulates the States as the owners of data bases." *Ibid.*

This is "not a case in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. Quite the contrary, PASPA's prohibitions on "licens[ing]" and "authoriz[ation] by law" apply *only* to "governmental entit[ies]." 28 U.S.C. § 3702(1). That is hardly surprising because only a government could "license" or "authorize" sports wagering "*by law*." PASPA's prohibitions on licensing and authorization by law thus are aimed squarely at "States in their sovereign capacity." *Reno*, 520 U.S. at 151. And because PASPA's prohibitions, as shown above, regulate States in the exercise of their sovereign lawmaking powers, *Baker* and *Reno* do not control this case.

b. *PASPA Does Not Implement A Cooperative Federalism Regime.*

The court of appeals also tried to draw support from this Court's cooperative federalism cases of *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.* and *FERC* v. *Mississippi*. Here again, the Third Circuit has misconstrued this Court's directions. Cooperative federalism statutes permit the States to regulate within limits set by Congress *or* to yield the field to federal regulation. PASPA, in contrast, provides no option of yielding the field to federal regulation of sports wagering; no federal regulatory scheme exists.

PASPA instead dictates continued state prohibition of sports wagering. That is not cooperative federalism.

In *Hodel*, for example, the Surface Mining Act at issue permitted "any State wishing to assume permanent regulatory authority over the surface coal mining operations on 'non-Federal lands' within its borders" to "submit a proposed permanent plan to the Secretary [of the Interior] for his approval." 452 U.S. at 271. The Act then required the Secretary to "develop and implement a federal permanent program for each State that fails to submit or enforce a satisfactory state program." *Id.* at 272. This latter option left States free to choose not "'to participate in the federal regulatory program in any manner whatsoever,'" and instead simply to leave the "'full regulatory burden'" to the federal government. *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

FERC was similar. The statute at issue there required only that States *consider* federal standards, and the Court noted that "if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals." 456 U.S. at 764. As a result, while Congress had "allowed the States to continue regulating in" an area where Congress had adopted minimum standards, it did not require the States to continue acting in that area against their will. *Id.* at 765.

PASPA does not enact a cooperative federalism regime like the statutes at issue in *Hodel* and *FERC*. While the Third Circuit described *Hodel* and *FERC* simply as cases involving "federal regulation in an otherwise preempted field," Pet. App. 20a (quotations

omitted), the defining feature of cooperative federalism is that States have "the choice of regulating that activity according to federal standards" or "simply stop[ping] regulating in the field" and ceding the field to federal regulation. *New York*, 505 U.S. at 161, 167. PASPA does not give States that "choice"; there is no federal regulatory (or deregulatory) regime of sports wagering poised to occupy the field if New Jersey were to "stop[] regulating in the field." *FERC*, 456 U.S. at 764. Quite the opposite, the central federal proscription of sports wagering looks to *state law* to determine its application and does not apply where a State has legalized the activity. *See* 18 U.S.C. § 1084(b). And that is why PASPA requires States to prohibit sports wagering.

In the absence of a choice to cede regulatory responsibility to the federal government, a federal statute that requires States to regulate according to federal standards is simply "regulat[ing] state governments' regulation of interstate commerce," *New York*, 505 U.S. at 166, which is not a "pre-emptible field," Pet. App. 19a; *see also New York*, 505 U.S. at 179 (Supremacy Clause does not provide "any authority on the part of Congress to mandate state regulation"); *see also Petersburg Cellular*, 205 F.3d at 702 (rejecting the argument that "preemption" can cover "any congressional instruction to the states" where those instructions "coopt potentially unwilling state and local legislative bodies to achieve federal policy objectives"); Mikos, *On the Limits of Supremacy*, 62 Vand. L. Rev. at 1446 (Congress's preemption power "is constrained by the Supreme Court's anti-commandeering rule"). *Hodel* and *FERC* thus offer no support for the Third Circuit's ruling.

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PASPA's invalidation of New Jersey's 2014 Repeal compels New Jersey to prohibit sports wagering according to federal instruction, and unconstitutionally commandeers New Jersey's regulatory authority in the service of federal objectives. It is, therefore, unconstitutional.

II. PASPA SHOULD BE STRICKEN IN ITS ENTIRETY.

As shown above (*see* Section I.C.2.a), PASPA's impermissible commandeering cannot be avoided by construing the statute—as the Third Circuit and the United States once did—to permit States to repeal their own state-law prohibitions. That would be at war with the text of the statute and its central purpose, which is to prevent "[w]idespread legalization of sports gambling." S. Rep. 102-248, at 5. Because a court "cannot ignore the text and purpose of a statute in order to save it," *Boumediene* v. *Bush*, 553 U.S. 732, 787 (2008), PASPA's prohibition on States "authoriz[ing]" sports wagering thus cannot be salvaged by a narrow construction. And without an effective prohibition against States legalizing sports wagering, PASPA cannot function in "a manner consistent with the intent of Congress." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). PASPA thus should be struck down in its entirety.

"'The standard for determining the severability of an unconstitutional provision is well-established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *New York*, 505 U.S. at 186 (quoting *Alaska*

Airlines, 480 U.S. at 684). But to be "fully operative as a law," it is not sufficient for the remaining provisions just to "operate in some coherent way," *NFIB*, 567 U.S. at 692; they have to work "in a manner consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685. Where a statute cannot "operate in the manner Congress intended," "the remaining provisions must be invalidated." *NFIB*, 567 U.S. at 692. The analysis thus is "essentially an inquiry into legislative intent." *Randall*, 548 U.S. at 262.

As shown above, the plain meaning of "authorization," PASPA's legislative history, and PASPA's neighboring prohibition on licensing all demonstrate that Congress's principal objective in enacting PASPA was to prevent States from legalizing sports wagering. Without that principal objective, there is little reason to think that Congress would have enacted any of Section 3702(1)'s ancillary prohibitions on state "sponsor[ship], operat[ion], advertis[ment], promot[ion], [and] licens[ing]." 28 U.S.C. § 3702(1). And, indeed, when a federal act's "predominant purpose" has been excised, this Court has regarded the remainder as "inseverable." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999).

That would be particularly appropriate here because absent PASPA's prohibition on state *legalization*, Section 3702(1)'s remaining prohibitions would function principally to prevent States from ensuring that legal sports wagering is responsibly operated and regulated. A ban on licensing and regulation—and the necessary implication that PASPA would thereby

be channeling States toward *unregulated* sports wagering—would fly in the face of Congress's mandate of a "comprehensive system of State regulation" in the one circumstance where PASPA, as enacted, did contemplate a potential expansion of sports wagering—in Atlantic City. 28 U.S.C. § 3704(a)(3)(B). It also would be at odds with the Senate Judiciary Committee's statements that PASPA was intended to forestall "promot[ion] [of] gambling among our Nation's young people." S. Rep. 102-248, at 3–4, 5. That objective certainly would be pursued by state regulators, but is far less likely to be fulfilled in the absence of regulation. This leads inexorably to the conclusion that the ban on state licensing must fall with the unconstitutional prohibition on state authorization by law. Congress plainly would not have wanted state legalization of sports wagering without state licensing.[3]

Finally, invalidation of PASPA's prohibition on a "authoriz[ation] by law or compact" necessarily takes down the whole of Section 3702(2). Far from being severable, Section 3702(2)'s textual link to Section 3702(1)'s invalid prohibition on "authoriz[ation] by law or compact" demonstrates that it is "dependent" on the latter provision and therefore not "separable." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936).

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[3] And if PASPA's prohibition on licensing private sports wagering schemes were stricken, Congress would not have persisted in enacting its prohibitions on state sponsorship, operation, advertisement, and promotion. These prohibitions target State-run wagering operations, prohibiting States from setting up a sports wagering scheme similar to the Delaware Sports Lottery that is exempted by PASPA. *See* 28 U.S.C. § 3704(a)(2). There is no evidence that Congress would have singled out State-run schemes *uniquely* for prohibition.

As crafted by Congress, the two prohibitions work in complementary fashion: Section 3702(1) prohibits States from legalizing sports wagering "by law or compact," and Section 3702(2) prohibits individuals from operating sports wagering schemes "pursuant to" that same "law or compact." But in the absence of Section 3702(1)'s prohibition on state authorization by law, Section 3702(2)'s prohibition against operation "pursuant to" such a state law functions not as a complement to Section 3702(1)'s prohibition, but as a nonsensical federal prohibition that permits sports wagering when prohibited by state law but prohibits such wagering when it is permitted by state law. In that circumstance, Section 3702(2) clearly would not be "operating in the manner Congress intended." *NFIB*, 567 U.S. at 692. Nothing in the text or history of PASPA evidences an intention to alter the rule set forth in 18 U.S.C. § 1084 that sports wagering is legal as a matter of federal law if it is legal in the State in which it occurs. To the contrary, PASPA commandeers state regulatory authority and requires States to maintain their state-law prohibitions precisely so Congress can claim to have "stop[ped] the spread of sports wagering" without altering the background federal rule and "at no cost to the federal government." S. Rep. 102-248, at 9.

Because the text of Section 3702(2) demonstrates that it was not intended by Congress to be a freestanding prohibition, but rather a complement to Section 3702(1)'s impermissible prohibition against state authorization by law, Section 3702(2) cannot be severed. PASPA, which has no application without Section 3702's prohibitions, should be stricken in its entirety.

CONCLUSION

To meet Congress's objective of forestalling further legalization of sports wagering, PASPA directs States to maintain in effect their state-law prohibitions on the activity. Our constitutional structure does not permit Congress to regulate interstate commerce in that manner. Indeed, PASPA reflects precisely the method of governance—"ineffectual and provocative of federal-state conflict," *Printz*, 521 U.S. at 919—that the Articles of Confederation employed but that the Constitution's Framers, after much debate, expressly rejected in favor of a federal government that could act directly upon citizens. Under our Constitution, if Congress wishes for sports wagering to be illegal, it must make the activity unlawful itself. It cannot compel States to do so. The decision of the court of appeals should be reversed.

Respectfully submitted,

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August 29, 2017

APPENDIX

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U.S. Constitution, Amendment X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 3701 provides:

§ 3701. Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

28 U.S.C. § 3702 provides:

§ 3702. Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3703 provides:

§ 3703. Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

28 U.S.C. § 3704 provides:

§ 3704. Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

New Jersey P.L. 2014, c. 62 provides:

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L.1977, c.110, and repealing sections 1 through 6 of P.L.2011, c.231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.5:12A-7 Certain provisions repealed relative to wagers on certain sports contests, athletic events.

1. The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L.1977, c.110 (C.5:12-1 et seq.), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or

to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L.2014, c.62 (C.5:12A-7 et al.):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located.

C.5:12A-8 Construction of act.

2. The provisions of this act P.L.2014, c.62 (C.5:12A-7 et al.), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement

and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

3. Section 24 of P.L.1977, c.110 (C.5:12-24) is amended to read as follows:

C.5:12-24 "Gross revenue."

24. "Gross Revenue"-- The total of all sums actually received by a casino licensee from gaming operations, less only the total of all sums actually paid out as winnings to patrons; provided, however, that the cash equivalent value of any merchandise or thing of value included in a jackpot or payout shall not be included in the total of all sums paid out as winnings to patrons for purposes of determining gross revenue. "Gross Revenue" shall not include any amount received by a casino from casino simulcasting pursuant to the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-191 et al.).

C.5:12A-9 Severability.

4. The provisions of this act, P.L.2014, c.62 (C.5:12A-7 et al.), shall be deemed to be severable, and if any phrase, clause, sentence, word or provision of this act is declared to be unconstitutional, invalid, preempted or inoperative in whole or in part,

or the applicability thereof to any person is held invalid, by a court of competent jurisdiction, the remainder of this act shall not thereby be deemed to be unconstitutional, invalid, preempted or inoperative and, to the extent it is not declared unconstitutional, invalid, preempted or inoperative, shall be effectuated and enforced.

Repealer.

5. Sections 1 through 6 of P.L.2011, c.231 (C.5:12A-1 through C.5:12A-6) are repealed.

6. This act shall take effect immediately.

Approved October 17, 2014.